

NTSB Order No. EA-5009

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of December, 2002

Respondent .

The respondent has appealed from the written order Administrative Law Judge William E. Fowler, Jr., served in this proceeding on November 1, 2002. By that order, the law judge granted the Administrator's motion to dismiss as untimely the appeal the respondent had taken from an emergency order revoking his airline transport pilot certificate.¹ For the reasons set

¹A copy of the law judge's order is attached. On October 23, 2002, the law judge had dismissed as untimely a petition the respondent had filed for review of the Administrator's emergency determination.

forth below, we will deny the appeal.²

The Administrator served her emergency order of revocation on the respondent on September 23, 2002, by sending copies by regular and certified mail to the Anchorage, Alaska, address identified as his in the FAA's Airmen Certification Branch.³ It appears, however, that while respondent's wife was still living at the Anchorage address, he had moved to Kotzebue, Alaska, a few months earlier.⁴ The law judge concluded that since the revocation order was sent to his official address of record, respondent's notice of appeal was due ten days thereafter, on October 3. He rejected respondent's contention that the 10-day period for filing an appeal should run from October 11th, the date respondent asserts he actually received a copy of the order, after his return to Alaska on October 9th following a nearly three-week vacation abroad that began on September 20.

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²The Administrator has filed a reply opposing the appeal.

³The Emergency Order of Revocation alleged that respondent, in connection with flights he had operated in air commerce in May 2002, under Parts 119 and 135 of the Federal Aviation Regulations, "FAR," 14 C.F.R. Parts 119 and 135, had violated FAR sections 43.12(a)(3), 91.13(a), 91.211(a)(2) and (3), 91.407(a)(2), 135.65(b) and 135.89(a)(2). The order noted that the Board had, in Board Order No. EA-4460 (1996), affirmed a revocation of respondent's airman certificate for his violations of FAR sections 61.59(a)(2), 91.13(a), and 135.63(d).

⁴Respondent's wife, who the respondent asserts he was in the process of divorcing, apparently refused delivery of copies of the revocation order at the Anchorage address. The respondent had attempted to update his address with FAA, but his official address of record had not yet been changed because he had not fulfilled a request that he provide a residence address in Kotzebue in addition to a post office box number.

Respondent surrendered his certificate to the FAA on October 11th, but he did not file his notice of appeal with the Board until October 16, 2002, five days later.⁵

On appeal, respondent argues that the law judge erred by not finding that he had demonstrated good cause to excuse his failure to file the notice of appeal on time. We share the law judge's view that respondent was constructively served with the copy of the Administrator's order sent to his Anchorage address on September 23, 2002. At the same time, we think the respondent has a point in believing that the law judge's good cause analysis was too narrow. Specifically, since the 10-day period for appealing from the revocation order expired while respondent was out of the country,⁶ the good cause determination, in our opinion, should have taken that circumstance into account in assessing whether respondent's failure to file on time was excusable. Assuming that that reason constituted an acceptable basis for extending the deadline, the focus of the inquiry should then have shifted to an assessment of the respondent's diligence

⁵Respondent advised that he had obtained counsel on the 14th of October, who filed the notice of appeal two days later, on October 16.

⁶Respondent returned to Anchorage from a trip to the Philippines on October 9. As he apparently did not receive a copy of the revocation order until October 11th, he would not have been able to file a notice of appeal by the October 3rd due date even if the Administrator had served him at the Kotzebue address. It seems that respondent may have known before the 11th, perhaps as early as the 9th, that some action had been initiated, as he, for reasons not identified in the record, called the FAA office in Anchorage on that day and, on being advised that an emergency order had issued, visited the office to obtain a copy and surrender his certificate.

in pursuing an appeal once he belatedly became aware of the opportunity to do so. Although we are reluctant to conclude, on the facts of this case, that respondent's absence from the country excused his failure to receive timely advice of the Administrator's action, we have no difficulty finding that, if it did, he did not act with necessary dispatch when he became aware that the time for taking action to protect his certificate rights had already run.

At the time the revocation order was served, respondent had already had several meetings with the FAA concerning the issues which became the allegations of violations cited in the order, including one only days before he left on his extended vacation. He was thus aware, or should have been, especially in light of his violation history, see note 3, infra, that correspondence from the Administrator concerning the matter could be sent to him at any time, and that it might require a prompt response.⁷ Despite this, he departed on an extended leave without so much as advising the FAA office he knew was conducting the investigation that he would be away, much less taking any steps to put in place some mechanism that would ensure his timely receipt of any communications that might be sent to him while he was gone.⁸ We

⁷The prior enforcement action brought against the respondent was also an emergency proceeding.

⁸Curiously, respondent complains that he was not advised, at the meeting three days before he left, that an order might be issued soon. In the first place, it appears that counsel for the Administrator neither knew of respondent's vacation plans nor when an order would, in fact, be issued. In the second place, it was the respondent's obligation, not the Administrator's, to

discuss these factors here not because we believe that respondent had some absolute duty, given his knowledge of a pending investigation, to be continuously reachable by the Administrator in short order,⁹ but, rather, because we think they demonstrate that respondent's delay in learning of the certificate action was a predictable consequence of his own making.

Nevertheless, assuming, for purposes of argument, that respondent's absence from home during the period within which an appeal needed to be filed would have justified an extension of time to file one, it would only have warranted an extension of the deadline through the date, i.e., October 11th, that he actually became aware of the order and its expired deadline for filing an appeal.¹⁰ It would not justify an extension of five days beyond that date. In other words, the respondent's failure

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arrange his activities in a manner that would not leave him uninformed for a lengthy period about important information or developments relevant to the exercise of his certificate rights.

⁹Compare Administrator v. Durst, NTSB Order No. EA-4400 (1995)(three week absence from residence *after* appeal filed with Board not good cause for missing deadline for notice of appeal from law judge's decision, "[i]nasmuch as respondent did not take the necessary steps to ensure timely receipt of information pertaining to the status of his appeal while away from his residence").

¹⁰The Board has a policy against granting extensions of time in emergency cases because the Board itself has a statutory deadline for deciding appeals in such cases. This does not mean that an extension would not be available in appropriate, extraordinary circumstances. It does mean that a respondent requesting one might have to waive expedited processing under the Board's emergency rules where the grant of an extension would jeopardize the Board's ability to meet the time limit the law imposes on it. See Administrator v. Mace, 7 NTSB 478 (1990), affirmed 948 F.2d 781 (C.A.D.C. 1991).

to notify the Board immediately of his desire to appeal from the Administrator's order, orally or in writing, precludes a finding on the facts before us that good cause exists to excuse the untimeliness of his notice of appeal. Dismissal of the appeal was therefore appropriate. See, e.g., Administrator v. Lowe, NTSB Order No. 4636 (1998), and Administrator v. Edwards, NTSB Order No. 4378 (1995).

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and
2. The law judge's order granting the Administrator's motion to dismiss is affirmed.

CARMODY, Acting Chairman, and HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur, and did not submit a dissenting statement.